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Supreme Court, U.S.
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No. 01-685

In the Supreme Court of the United States

K. DANIEL RUPP,

Petitioner,

v.

DAVID PHILLIPS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF

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I. THE EXCHANGE OF ARGUMENTS CONFIRMS CERTAIN UNDISPUTED FACTS CENTRAL TO THIS CASE.

Whether by admission or omission, Phillips' Response confirms the undisputed nature of the following sequence of events:

- Daniel Rupp learned about a potential threat of biological warfare posed by Timothy Tobiason. (Response at 4).

- Rupp told the FBI what he had learned—an act that even Phillips concedes was protected by the First Amendment to the United States Constitution. (Response at 5, 15).

- Phillips does not claim that this contact was disruptive to the operations of the Federal Public Defender's Office in any respect. (Response at 1, 5).

- Nevertheless, Rupp's supervisors responded by banning Rupp from speaking again to the FBI on that subject, first by ordering him to have no involvement whatsoever in the FBI's investigation and then by ordering him to bring new information relevant to this suspect *to the Federal Public Defender's Office* and not to the FBI, so that Phillips could determine "how to proceed." (Response at 7).

- In response to an effort to discourage Tobiason from taking action, Rupp learned new and important information from Tobiason, regarding Tobiason's future intentions. (Response at 9).

- Rupp did not withhold this information from the FBI, but shared it with them out of a sense of moral and civic duty.

- Because Rupp had talked again to the FBI, Phillips fired Rupp. (Response at 11).

II. PHILLIPS CANNOT REBUT PETITIONER'S CONSTITUTIONAL CHALLENGES BY CHARACTERIZING RUPP'S COMMUNICATIONS TO THE FBI AS "DECEPTIVE."

Reduced to its essentials, Phillips' Response asserts that Rupp intentionally violated orders not to communicate with the FBI, and that Rupp was fired because his subsequent communications with the FBI were "deceptive" and "disruptive." (*See* Response at 7, 11, 15). These propositions are subject to fact disputes. (See Petition at 25-28). Nevertheless, even if deemed true, Phillips' factual assertions do not resolve the important constitutional issues presented in this Petition.

The disruption Phillips describes to justify Rupp's termination is not focused on whether Rupp's FBI communications themselves disrupted the Wichita Office of the Federal Public Defender ("FPD"). The asserted disruption stems from Rupp's failure to comply with Phillips' orders; the disruption is thus a consequence of those orders. Phillips' argument therefore begs the fundamental questions at the heart of this Petition: (1) Could Phillips lawfully prohibit Rupp from sharing information about prospective criminal activity by a non-client with the FBI?; and (2) Did Rupp have a constitutional right to communicate with the FBI despite that order?

In fact, Phillips' orders to Rupp were even broader than merely prohibiting communications with the FBI. To justify Rupp's termination for insubordination, Phillips describes the broad sweep of his orders to Rupp without defending the breadth of those orders. In so doing, Phillips actually makes it easier for this Court to appreciate the unconstitutional scope and impact of his directives to Rupp. According to Phillips, not only did members of his office prohibit further communications between Rupp and the FBI, he insisted that if Rupp received any incidental communications from the suspected bioterrorist (Tobiason), Rupp must bring such information to them rather than to the FBI. In the Response, Phillips states:

> Rupp said that he told the FBI that he would let them know if he heard from Tobiason. McNorton said "No, let us know and we'll see how to proceed."

(Response at 7) (quoting testimony of Cindy McNorton, Rupp's supervisor). Therefore, when evaluating Phillips' orders, this Court must examine the justification for a federal employer to insist that information relevant to law enforcement must first be presented to the employer for a determination of "how to proceed."

If Phillips cannot show the constitutionality of his directives when issued to Rupp, he cannot justify the termination based on the supposed insubordination or breach of trust by Rupp in failing to completely follow it.[1]

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[1] Rupp's Petition explained why insubordination is not a constitutional basis for terminating a public employee if the insubordination related to an unconstitutional order. (Petition at 24). Phillips makes no effort to demonstrate otherwise.

When the prohibition was imposed, there was, at most, a "concern" by Rupp's supervisors about how criminal defendants might perceive the agency if Rupp were to become a witness for the prosecution and that fact were to become publicly known. Yet that "concern" is the antithesis of the "actual disruption" that this Court's rulings require before speech can be suppressed or punished.

Moreover, that ban was based on the provably false premise that it would be a violation of the agency's Code of Conduct for an investigator for the FPD to become involved in an investigation by the FBI. A review of the Code of Conduct (Response App. 72-8) does not support Phillips' contention that Rupp's communications with the FBI violated the Code—especially where the suspect was not a client of the Wichita Federal Public Defender's Office and had not been charged with any crime. (Indeed, the likelihood that Tobiason, a Nebraska resident, might become a client of the Wichita Office of the Federal Public Defender at some point in the future was highly speculative at best.)

Most significantly, attorneys (and their agents) are not forbidden from reporting information about pending or future crimes (Response App. 76), even when they may be in an attorney-client relationship with a potential suspect.[2] This Court must therefore examine whether Phillips' orders to Rupp and his subsequent termination of Rupp (citing

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[2] Rule 1.6(b)(1) of the Kansas Rules of Professional Conduct governing "Confidentiality of Information" states that, even with respect to an existing client,

> "A lawyer may reveal such [privileged] information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime;"

purported "conflict of interest grounds") were legitimate and constitutionally justified.

Finally, even the Tenth Circuit recognized that Rupp may have rights to act as he did without losing his job. (App. 13 n. 4). Phillips' emphasis on Rupp's supposed "deception" was not a discernable part of the Tenth Circuit analysis. (App. 10-15). To the contrary, the Tenth Circuit suggested that if "Mr. Rupp's continued assistance with the investigation was imperative, our balancing assessment could well be different." (App. 13 n. 4). Petitioner has challenged the introduction of such an unprecedented and unpredictable test to justify the exercise of rights of free speech. Nevertheless, even the Tenth Circuit would have protected Rupp's "disobedience" had it deemed such communications "imperative." This Reply Brief therefore turns to whether such a test based upon the "imperative" character of information about crime is constitutionally defensible.

III. PHILLIPS DOES NOT ADDRESS RUPP'S CHALLENGE TO THE TENTH CIRCUIT'S REQUIREMENT THAT INFORMATION SHARED WITH THE FBI MUST BE "IRREPLACEABLE" AND "NEW" TO QUALIFY FOR FIRST AMENDMENT PROTECTION.

The first portion of Rupp's Petition challenged the wisdom of three key legal rules that the Tenth Circuit relied upon in evaluating Rupp's continued cooperation with the FBI. The Tenth Circuit held that continued cooperation with law enforcement is not worthy of significant protection unless:

1) the speaker's involvement is "irreplaceable;"

2) the information communicated was "new;" and

3) the information concerned public, not private, wrongdoing.

(App. 10-13).

Phillips has made little effort to justify any of these three rules. His Response makes no attempt to tie any of these rules to a doctrinal foundation in the First Amendment jurisprudence of this Court. His Response instead accepts the wisdom of each of these rules, and simply attempts to show that two of them apply to Rupp's speech.[3]

The Tenth Circuit adopted a rule that required Rupp to prove that he was "irreplaceable" to the FBI's investigation of Tobiason. (App. 12). Without attempting to defend the wisdom of this distinction, Phillips simply represents—on six different occasions—that FBI Agent Vick specifically testified that Petitioner's cooperation in the investigation was unnecessary. (Response at 24).[4]

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[3] Notably, Phillips makes no attempt to defend the Tenth Circuit's conclusion that the speech for which Rupp was fired was not "new." As demonstrated in the Petition, the communications with the FBI for which Rupp was fired included new and compelling information regarding the present intentions of a potential bioterrorist. (Petition at 18-19). Although the Tenth Circuit ignored this evidence, Phillips nevertheless seeks to protect that ruling from review.

[4] Phillips convinced the Tenth Circuit to agree. The Tenth Circuit panel stated that the FBI "was certainly capable of carrying out an investigation of Mr. Tobiason with or without Mr. Rupp's help. Indeed, Agent Vick testified to this fact." (App. 12). To underscore this consideration, the Tenth Circuit panel added:

"In addition, if there had been some indication that

With all due respect to Phillips and his counsel, that is an answer which they failed to extract from Vick in his deposition.[5] The actual questions posed to Vick on this topic, and his actual answers, are different in critical respects:

> Q. Do you feel the FBI was capable of investigating Mr. Tobiason without the assistance of Mr. Rupp?
>
> MS. KARLIN: Objection. It's outside the scope,

> Mr. Rupp's continued assistance with the investigation was imperative, our balancing assessment could well be different."

(App. 13 n. 4).

[5] This portion of Agent Vick's deposition testimony is described throughout Phillips' Response–but never accurately. *See* Response at 8 ("From the beginning of Petitioner's involvement with the FBI, Agent Vick felt that the investigation and potential prosecution of Tobiason could occur without Petitioner's assistance"); *id.* at 8 n. 4 (referring to "Agent Vick's testimony that Petitioner was unnecessary to the investigation and prosecution of Tobiason"); *id.* at 16 ("FBI Agent Vick specifically testified that Petitioner's cooperation in the investigation was unnecessary"); *id.* at 24 ("FBI Agent Vick testified that Petitioner was unnecessary to the investigation and potential prosecution of Tobiason"); *id.* at 25 ("The balance weighs even more heavily in favor of Respondent considering Petitioner's participation was unnecessary."); *id.* at 30 ("The fact remains that Agent Vick specifically testified that the FBI did not need Petitioner's assistance 'to continue with any investigation and potential prosecution of Mr. Tobiason.'"). The Response also represents, incorrectly, that "*Petitioner's* sworn deposition testimony verifies that . . . the FBI felt Petitioner's continued involvement was unnecessary. (Response at 26-27)(emphasis added).

instruct him not to testify.

A. Prefer not to answer that.

****

Q. So based on your involvement with Mr. Rupp in this investigation—let me strike that. *Based on the arrangement that you made with Mr. Rupp at the beginning of his involvement with this investigation,* you were *proceeding under the assumption* that you *would be able to continue* with any investigation and potential prosecution of Mr. Tobiason without the assistance of Mr. Rupp?

A. Yes.

Q. Therefore, he wasn't vital to the prosecution of Mr. Tobiason?

A. By—I'm struggling with—

Q. I'll withdraw the question.

A. —with the vital part.

Q. I'll withdraw the question.

Mr. Fischer: Nothing further.

Mr. Hollis: Nothing further.

(The deposition concluded at 11:50 a.m.)

(Response App. 36-38)(emphasis).

Perhaps Phillips does not address the Tenth Circuit's "irreplaceable" information standard because it cannot be logically defended. As the Federal Law Enforcement Officers Association (FLEOA) emphasizes in moving for amicus status, ". . . the Tenth Circuit decision forces public employee witnesses to make decisions about the importance of their information and the necessity of their cooperation with law enforcement that they cannot reasonably make at the time they provide the information and cooperation. *Indeed, federal law enforcement officers often cannot reasonably make that judgment at the time the information and cooperation is offered.*" Motion of FLEOA for leave to File Brief *Amicus Curiae, et al.*, p. 3 (emphasis added).

Dated: December 21, 2001.

Respectfully submitted,

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